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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DENNIS E. LUTZ AND
O. ANTHONY LEYVA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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January 9, 1989

QUESTION PRESENTED

WHETHER A RETRIAL OF PETITIONERS WOULD VIOLATE DOUBLE JEOPARDY WHEN, IN THE ABSENCE OF MANIFEST NECESSITY, THE TRIAL COURT GRANTED THE GOVERNMENT'S MOTION FOR MISTRIAL OVER PETITIONERS' OBJECTIONS.

PARTIES BELOW

United States of America

Dennis E. Lutz

O. Anthony Leyva

Leslie Ferguson

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES BELOW	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING WRIT	
A RETRIAL OF PETITIONERS WOULD VIOLATE DOUBLE JEOPARDY WHEN, IN THE ABSENCE OF MANIFEST NECESSITY, THE TRIAL COURT GRANTED THE GOVERNMENT'S MOTION FOR MISTRIAL OVER PETITIONERS' OBJECTIONS	3
CONCLUSION	7

TABLE OF AUTHORITIES

Cases: Page

Arizona v. Washington
435 U.S. 497, 98 S.Ct. 824,
54 L.Ed.2d 717 (1978) 4, 6

Oregon v. Kennedy
456 U.S. 667, 102 S.Ct. 2083,
72 L.Ed.2d 416 (1982) 4

Other Authorities:

Fifth Amendment, United States Constitution 2, 3

28 U.S.C. §1254(1) 1

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DENNIS E. LUTZ and O. ANTHONY LEYVA petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in this cause.

OPINION BELOW

The decision of the Court of Appeals (Appendix A, infra) is an unpublished opinion.

JURISDICTION

The Court of Appeals affirmed the district court ruling and a timely motion for rehearing was denied on November 10, 1988 (Appendix B, infra). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Petitioners were indicted on February 19, 1987 and a Superseding Indictment was filed on May 21, 1987. Petitioner Lutz was charged with one count of conspiracy to possess with intent to distribute a controlled substance and six counts of traveling through interstate commerce to facilitate unlawful activities. Petitioner Leyva was charged with one count of conspiracy to possess with intent to distribute a controlled substance and one count of possessing with intent to distribute a controlled substance.

The trial of Petitioners began on August 28, 1987. The Government rested its case on September 4, 1987 and the trial recessed until Tuesday, September 8, 1987. The trial court heard motions on the morning of September 8, 1987 and recessed until 1:00 P.M. that day.

Upon reconvening, the trial court was informed by defense counsel that the Government's key witness, Susan Kastenhuber, had perjured herself numerous times while testifying for the Government.

After three and one-half days of motions and hearings, the trial court granted, over Petitioners' objections, the Government's motion for mistrial. During the hearings, Petitioners argued that manifest necessity for a mistrial did not exist, and they suggested reasonable alternatives to a mistrial. All such alternatives were rejected by the trial court.

Initially, the trial court granted the alternative of recalling Ms. Kastenhuber as a witness. After learning that Ms. Kastenhuber would assert her Fifth Amendment privilege not to testify, Petitioners explained to the trial court that they still wanted to

call Ms. Kastenhuber and ask her questions in the areas of her perjured testimony.

Also, Petitioners informed the trial court that if it no longer would allow Ms. Kastenhuber to testify, then Petitioners would request striking Ms. Kastenhuber's testimony and giving the jury a cautionary instruction.

The trial court rejected both of these reasonable alternatives to a mistrial, and over Petitioners' objections, granted the Government's motion for mistrial. A retrial was set from which Petitioners appealed.

The trial court's decision was affirmed and a timely motion for rehearing was denied on November 10, 1988.

REASONS FOR GRANTING THE WRIT

A RETRIAL OF PETITIONERS WOULD VIOLATE DOUBLE JEOPARDY WHEN, IN THE ABSENCE OF MANIFEST NECESSITY, THE TRIAL COURT GRANTED THE GOVERNMENT'S MOTION FOR MISTRIAL OVER PETITIONERS' OBJECTIONS.

The Fifth Amendment to the United States Constitution states, in part:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . .

The purpose of this provision is to prevent an individual from being prosecuted more than once for the same offense.

A criminal defendant is entitled to have his trial completed in front of a single jury. This Court has stated:

> Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's 'valued right to have his trial completed by a particular tribunal.' (citation omitted). The reasons why this 'valued right' merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second

> prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed.

Arizona v. Washington, 435 U.S. 497, 503-04, 98 S.Ct. 824, 54 L.Ed. 717 (1978).

In Petitioners' case, their trial was aborted before it was completed, and the mistrial was granted over their objections. The double jeopardy test generally adopted when a mistrial is granted over a defendant's objection is whether or not "manifest necessity" existed. *Oregon v. Kennedy,* 456 U.S. 667, 672, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). *See also Arizona v. Washington, supra,* 434 U.S. at 505 ("...the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant").

Petitioners assert that a mistrial was granted over their objections even though manifest necessity did not exist. The trial of Petitioners began on August 28, 1987, and the Government rested its case on September 4, 1987, after six days of trial.

The trial was then recessed until Tuesday, September 8, 1987. On the morning of September 8, 1987, the trial court heard motions, and the trial was recessed until 1:00 P.M. that day.

Upon reconvening, defense counsel informed the trial court that the prosecution's key witness, Susan Kastenhuber, had perjured herself numerous times while testifying for the Government.

During the following three and one-half days, motions were made regarding the new posture of the trial, and hearings were held by the trial court. Petitioners did everything in their power to have their original tribunal decide their case.

Keeping in mind that the financial and emotional burdens of a second two-week federal trial would be devastating to Petitioners, they presented the trial court with reasonable alternatives to a mistrial.

Initially the trial court granted one of the alternatives presented by Petitioners. The trial court stated that Petitioners could recall Ms. Kastenhuber as a witness for further examination relative to her areas of perjured testimony.

Prior to having Ms. Kastenhuber retake the witness stand, the trial court inquired and learned that Ms. Kastenhuber would assert her Fifth Amendment privilege against self-incrimination when asked about the areas of her perjured testimony.

Petitioners explained to the trial court that they still wished to call Ms. Kastenhuber to the witness stand, and after she asserted her Fifth Amendment privilege, the trial court could give the jury an appropriate cautionary instruction. Petitioners would then argue Ms. Kastenhuber's credibility, or lack thereof, to the jury.

Also, Petitioners informed the trial court that if it no longer would allow Ms. Kastenhuber to testify, then Petitioners would request striking Ms. Kastenhuber's earlier testimony and giving the jury an appropriate cautionary instruction.

The Government made no attempt to shoulder the burden of showing manifest necessity when it then moved for a mistrial. Nevertheless, the trial court rejected Petitioners' reasonable alternatives to a mistrial, and over their objections, granted the Government's motion for mistrial. A retrial was set from which Petitioners' motion to dismiss on double jeopardy grounds was denied.

Petitioners come before this Court requesting certiorari relief because a retrial of them would violate the Fifth Amendment's protection against double jeopardy.

Petitioners were entitled to have their case completed by the originally selected tribunal. They presented reasonable alternatives to a mistrial in their effort to achieve this end and in an effort to avoid the financial and emotional burdens of another two-week trial. (Petitioners reside in Bradenton, Florida and the trial was in Columbus, Ohio, as would be a new trial).

The Government, on the other hand, did not shoulder any burden of showing manifest necessity. The Government was fearful of jury acquittals due to the actions of its own witness, so the Government cried foul and moved for a mistrial.

A mistrial granted for this reason goes to the very heart of the Fifth Amendment's double jeopardy protection and it bars a retrial. As this Court stated:

> Although there was a time when English judges served the Stuart Monarchs by exercising a power to discharge a jury whenever it appeared that the Crown's evidence would be insufficient to convict, the prohibition against double jeopardy as it evolved in this country was plainly intended to condemn this 'abhorrent' practice.

Arizona v. Washington, supra, 435 U.S. at 507-508.

In the Petitioners' trial, there was no manifest necessity for the granting of a mistrial. Absent this manifest necessity, the Fifth Amendment stands as a bar to a retrial of Petitioners because the mistrial was granted on the Government's motion and over Petitioners' objections. The Superseding Indictment against Petitioners should be dismissed on the grounds of double jeopardy.

CONCLUSION

Based upon the foregoing arguments and authorities, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

Page

APPENDIX A -

Opinion of the United States Court of Appeals for the Sixth Circuit A-1

APPENDIX B -

Order of the United States Court of Appeals for the Sixth Circuit denying a rehearing en banc B-1

APPENDIX A

No. 87-4039
No. 87-4040
No. 87-4041

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DENNIS E. LUTZ, O. ANTHONY LEYVA
and LESLIE FERGUSON,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

Decided and Filed _____

BEFORE: LIVELY, RYAN and NORRIS, Circuit Judges.

PER CURIAM. This appeal presents a double jeopardy issue. During a recess following completion of the government's case in chief in this criminal prosecution, the attorneys learned that an important government witness had perjured herself in responding to questions during cross examination. Before the trial resumed the prosecutor and the defense attorneys advised the court of their discovery, and the court directed the parties to file motions outlining the alternatives and indicating what steps they desired the court to take. Upon receiving this information the court denied two of the defendants' proposed alternatives: dismissal of the indictment or striking the witness's testimony

with an admonition to the jury.

The court then asked all counsel whether they desired to go forward with the trial or move for a mistrial. Counsel for two of the defendants, including the appellant Ferguson, stated that they desired to move for a mistrial, while counsel for the appellants Lutz and Leyva advised the court that they desired to recall the witness and proceed with the trial. The government then moved for a mistrial based on "manifest necessity" in light of the conflicting motions of the defendants. The court granted the motions for mistrial of Ferguson and another defendant not involved in this appeal, but denied the government's motion for a mistrial. After denying motions for acquittal by Lutz and Leyva, the court called the witness for questioning out of the presence of the jury.

The witness appeared with counsel, exercised her Fifth Amendment right to remain silent, and refused to answer any of the questions propounded to her. The government objected to having the witness brought before the jury since she had already indicated that she would answer no questions. The two defendants then moved to strike her testimony and have the jury admonished. The government opposed this alternative and again moved for a mistrial. After taking the matter under consideration the district court granted the government's motion for a mistrial and set the case for retrial. At this point the defendants Lutz, Leyva and Ferguson brought this interlocutory appeal, contending that a second trial would subject them to double jeopardy.

The issue on appeal is whether the district court committed reversible error in granting the government's motion for mistrial over the defendants' objection where the defendants offered reasonable alternatives, and in refusing to dismiss the indictment on double jeopardy grounds.

In denying the defendants' motion to dismiss the indictment and granting the government's motion for mistrial the district court entered a memorandum opinion in which it reviewed each step of the process by which it had reached the intermediate and ultimate decisions. Both the record of proceedings and the memorandum opinion indicate clearly that the district court considered the importance to the defendants of having the case tried to a conclusion before the jury first selected and sworn. After careful consideration of the four options proposed by the defendants, however, the court determined that the trial could not pro-

ceed free of the taint of perjured testimony. The district court specifically found that the government was not responsible for the perjury.

The Supreme Court has recently dealt with the issue of a trial court's decision to declare a mistrial on grounds of manifest necessity. In *Arizona v. Washington,* 434 U.S. 497, 515-16 (1978), the Court stated:

> The trial judge did not act precipitately in response to the prosecutor's request for a mistrial. On the contrary, evincing a concern for the possible double jeopardy consequences of an erroneous ruling, he gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial. We are therefore persuaded by the record that the trial judge acted responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding. Since he exercised "sound discretion" in handling the sensitive problem of possible juror bias created by the improper comment of defense counsel, the mistrial order is supported by the "high degree" of necessity which is required in a case of this kind. Neither party has a right to have his case decided by a jury which may be tainted by bias; in these circumstances, "the public's interest in fair trials designed to end in just judgements" must prevail over the defendant's "valued right" to have his trial concluded before the first jury impaneled.

(Footnotes omitted).

Upon consideration of the entire record, together with the briefs and oral arguments of counsel, we conclude that the district court did not abuse its discretion in declaring a mistrial and that a second trial will not subject the defendants-appellants to double jeopardy. The memorandum opinion of United States District Judge John D. Holschuh, filed November 10, 1987, displays a conscientious consideration of the available alternatives that satisfies the requirements for a finding of manifest necessity.

The judgment of the district court is affirmed.

APPENDIX B

No. 87-4039/40/41

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O R D E R

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DENNIS E. LUTZ (87-4039)
ANTHONY OFFIR LEYVA (87-4040)
LESLIE MARVIN FERGUSON (87-4041)
Defendants-Appellants

BEFORE: LIVELY, RYAN and NORRIS, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, *Clerk*